IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 354 OF 2000

Shri Arvind Ghansham Patil ..Appellant
(Orig.plaintiff)

V/s

1. Raju Dattu Dagade
2. Suresh Dattu Dagade .. Respondents
(Orig. Defendants)

Shri A.Y.Sakhare,Senior Advocate with Dilip Taur for Appellant

Shri A.V.Anturkar for Respondent

CORAM:S.R.SATHE,J.

DATED:28th March 2006

ORAL JUDGMENT :-

1. Being aggrieved by the judgment and order passed by the Court of the 2nd Joint Civil Judge, S.D., Pune in Special Civil Suit No.343 of 1992 whereby the

plaintiff's suit for specific performance of agreement to sell was dismissed, the plaintiff has filed the present appeal. For the sake of convenience hereafter the parties shall be referred to as the plaintiff and defendants.

2. Brief facts giving rise to this appeal are as under:-

. One Raju D. Dagade, original defendant no.1 told the plaintiff that he is the owner of half share in the lands bearing Survey No.101/1, 101/2, 101/3 and 101/4 situated at village Bavdhan, Taluka Mulshi, District Pune. As defendant no.1 wanted to make improvement in his lands he was in need of money. He therefore agreed to sell the suit lands admeasuring 1 Hectare 82 Ares to the plaintiff at the rate of Rs.1,20,000/- per Acre and accepted the earnest money of Rs.45,000/- and executed an agreement to the sale in favour of the plaintiff on 4-12-1987. He also handed over the possession of the suit lands to the plaintiff and agreed that he would give all documents pertaining to the suit land and also 7x 12 extract of last 30 years. He assured plaintiff that suit land has not been mortgaged to any other person and no other person is having any share in the same. It was also agreed by him that he would get land measured at his cost and if it appears that there is no way to the suit land he would provide the same at his cost. As per the terms of the said agreement it was

decided that after the compliance of the conditions nos.1 to 6 in the agreement, sale deed would be executed within a period of one year. The defendant no.1 further promised that in case any difficulty arises in execution of the sale deed as a result of some legal provisions, then, he would return the earnest money at the rate of 18% p.a.. According to the plaintiff, after the execution of the agreement to sell he paid money to the defendant no.1 by cash as well as by cheque and thus in all amount of Rs.1 lac was paid to the defendant no.1.

3. The suit lands were the ancestral lands of Tanhubai Dagade. She gave the said lands to the defendant no.1 and also accordingly submitted an application and affidavit to the revenue authorities for entering the name of defendant no.1 to the suit lands. However, in the year 1988 plaintiff noticed that name of defendant no.2 was entered in the record of rights in respect of the suit lands to the extent of 4 anna share. He therefore asked defendant no.1 about the same. He told him that name of the defendant no.2 is sham and bogus and he has no right, title or interest over the said property and in case his consent is necessary for the sale deed, he will obtain the same. In order to find out whether anybody is having right, title and interest in the suit property plaintiff issued public notice in daily Prabhat on 29-5-1989. The defendant no.2 in reply to the said notice raised objection for the transaction in question. According to the plaintiff he was all

along ready and willing to perform his part of the contract. However, the defendant was avoiding to complete the transaction on one or the other pretext. The plaintiff therefore asked the defendant no.1 on 17-11-1991 to execute the sale deed in presence of the agreement to sell. The defendant no.1 however refused. The plaintiff, therefore issued notice dated 19-11-1991 to the defendant no.1 and called upon him to execute the sale deed. The defendant no.1 gave false reply to the said notice dated 1-12-1991. Plaintiff therefore filed Special Civil Suit No.942 of 1992 on 3-8-1992 against the defendants for specific performance of the agreement to sell and alternatively claimed refund of earnest money with interest. By virtue of the amendment to the plaint, the plaintiff submitted that suit land is exclusively owned by the defendant no.1 and entry in the record of rights in respect of defendant no.2 is sham and bogus. He also submitted that in case it is held that plaintiff has not received the possession of the suit land at the time of agreement to sell then possession of land be handed over to him.

4. The defendant no.1 filed his written statement at Exh.25 and opposed the suit claim. Firstly, he contended that alleged agreement to sell has been executed on 4-12-1987 while the suit is filed on 3-8-1992 and as such the same is bad by law of limitation. He further contended that on 4-12-1987 he was in need of money and as such he informed to his

cousin brother viz. Sudam Dagade about his need. Sudam promised to make some arrangement for loan. He therefore took him to plaintiff who was serving in the company where Sudam was servings. After the talk with plaintiff he agreed to lend the amount of Rs.45,000/- at the interest rate of 30% per month. Plaintiff, however, told him that it would not be possible for him to prepare any document which would show the money lending transaction. It was also expressed that even execution o the mortgage deed is not possible, finally, it was decided to execute nominal agreement for sale. However, it was agreed that same would not to be acted upon and it was to be executed only by way of security. The defendant no.1 therefore contended that accordingly on 4-12-1987 plaintiff paid him only Rs.35,000/- and for balance amount of Rs.10,000/- bearer cheque was given. As the transaction was executed by way of security, there was no question of complying other terms and conditions of the agreement. According to him the price of the said land at the relevant time was about Rs.4 lacs per Acre and it was agreed to sell the suit land at the rate of Rs.1,20,000/- per Acre.

5. The defendant no.1 further contended that one Dharmaji was the original holder of the suit land. After his death in the year 1960 name of his widow Shakubai was entered in the record of rights and after her death the name of her daughter Tanhubai was mutated in the revenue record. After the death of Sakhubai in

the year 1968 the lands were in possession of Tanhubai and her family members. The defendant no.1 also contended that though his name was entered in the record of rights, the suit lands were in fact owned by joint family and thus his father, brother and sister all are having share in the same. Hence on all these grounds defendants contended that the plaintiff is not entitled for specific performance of on agreement to sell and prayed for dismissal of the suit.

6. The defendant no.2 filed his written statement at Exh.26. He also contended that suit lands are not exclusively owned by the defendant no.1 but the same are of their joint family. According to him the defendant no.1 alone had no right to enter into any transaction of an agreement to sell. Hence on all these grounds he also prayed for dismissal of the suit.

7. On these pleadings the learned trial Judge framed issues at Exh.120, In order to prove the said claim plaintiff examined himself at Exh.101 and produced certain documents. As against this defendant no.1 examined himself at Exh.133 and also produced certain documents. After considering the evidence adduced by both the parties the learned trial Judge came to the conclusion that the suit property is not exclusively owned by the defendant no.1 but it is joint family property as contended by the defendant no.2. He also held that defendant no.1 has failed to prove that

transaction between him and defendant was of money lending and agreement to sell is sham and bogus. The trial Court, however held that plaintiff has failed to prove that price of the land was more than Rs.1,20,000/- per acre. According to him plaintiff failed to prove that he was ready and willing to perform his part of the contract as a result of the same he held that plaintiff is not entitled for specific performance of the agreement to sell and by virtue of amendment plaintiff has already given up his claim for refund of earnest money, he, therefore, dismissed the plaintiff's suit.

8. Being aggrieved by the aforesaid order the plaintiff has filed the present Appeal. In this appeal before me, Mr.Sakhare, learned Senior Advocate for the plaintiff has urged mainly two points. Firstly, he submitted that the learned trial Judge has unnecessarily given importance to some over writing in the agreement to sell and wrongly held that plaintiff has not proved that defendant no.1 had agreed to sell the suit land at the rate of Rs.1,20,000/- per Acre. Secondly, he canvased before me that the learned Judge ought to have held that Tanhubai had submitted an application to the revenue authorities and had also filed an affidavit and given the suit property to defendant no.1 and thus the defendant no.1 is exclusive owner of the suit property and as such he had right to sell the suit property to plaintiff. He therefore submitted that specific performance cannot be denied on the ground that

agreement to sell was executed only by defendant no.1. The learned Advocate for the plaintiff also argued before me that merely because price of the suit land is considerably increased the specific performance cannot be denied. He also submitted that the learned trial Judge has wrongly observed that the plaintiff was not ready and willing to perform his part of the contract. He therefore submitted that appeal be allowed and the decree for specific performance be passed in favour of the plaintiff. As against this, Shri Anturkar, learned Advocate for the defendants submitted that plaintiff's suit is barred by law of limitation and finding recorded by the learned trial Judge on this issue is not correct. Secondly, he canvassed before me that there is absolutely no evidence to show that the plaintiff was and is ready and willing to perform his part of the contract and finding recorded by the learned trial Judge in this behalf is legal and correct. Lastly he submitted that there is enormous increase in the price of the suit land. The plaintiff did not take any steps during the period of limitation and as result o the same specific performance to agreement to sell cannot be granted in favour of the plaintiff. He therefore supported the judgment and order passed by the trial Court.

9. It is admitted that an agreement to sell in question (Exh.35) is executed on 4-12-1987 by defendant no.1 alone. In the said agreement it is mentioned that he is

the owner of half share in the suit lands i.e. to the extent of 1 Hector 82 Ares. However, now the defendants have contended that the suit land is the joint family property of defendant nos 1 and 2 and their father, and as such the defendant no.1 alone had no right to execute an agreement to sell and at any rate the plaintiff is not entitled to get specific performance of the agreement to sell if the property is the joint family property of defendant nos.1 and 2. At the outset it must be mentioned that suit property is not the self earned property of defendant no.1. Admittedly, he has received the same from Tanhubai. It is not in dispute that initially one Dharamaji was the holder of the suit land and after his death it devolved to his widow Sakhubai and then to her daughter Tanhubai. Admittedly,Tanhubai has not executed any relinquish deed in favour of the defendant no.1, the name of defendant no.1 is entered in the revenue record of the said property only by virtue of the application an affidavit submitted by Tanhubai. It is needless to say that mere such application or affidavit and consequential mutation entry made on the basis of the will not pass valid legal title to the defendant no.1. It has come on record that the property in question was being cultivated by joint family of the defendant nos 1 and 2 and their father. So, the learned trial Judge rightly held that there is no sufficient evidence to show that the suit property is/was exclusively owned by defendant no.1. When such is the position, then it is obvious that plaintiff is

not entitled to get specific performance of the agreement which is executed only by defendant no.1.

10. Shri Sakhare, learned Senior Advocate for the plaintiff strenuously argued before me that the learned trial Judge has wrongly held that plaintiff has failed to prove that price of the suit land was fixed at Rs.1,20,000/- per acre. He submitted that the learned trial Judge has given undue importance to some writing appearing in the said clause and in particular the figure "20". From perusal of the original agreement it is very clear that in clause no.10 it is mentioned that price of Rs. 1,20,000/- per Acre and Rs.25,000/- have been received as earnest money. It is pertinent to note that words Rs.1,20,000/- as well as Rs.25,000/- are written in ink while rest of the contents of the said agreement are type written. Taking advantage of this fact as well as of the fact that the plaintiff has admitted that contents regarding price are in his hand writing, the defendant contended that price was not fixed at Rs.1,20,000/- as alleged by the plaintiff. The learned trial Judge has holding that there is over writing came to the conclusion that plaintiff has failed to prove the rate fixed was Rs.1,20,000/- per acre. However, while doing so, the learned trial Judge has not at all taken into consideration one important piece of evidence or circumstance which definitely supports the case of the plaintiff that rate was fixed at Rs.1,20,000/- per acre.

11. It is an admitted fact that on 19-11-1991 plaintiff had issued notice to the defendant no.1 and same was admittedly received by the defendant no.1. In this notice the plaintiff had specifically averred that price of the land in question is fixed at Rs.1,20,000/- per acre. It is not in dispute that this notice is replied by the defendant and in that notice the defendant no.1 had numbers challenged the averments in the plaintiff's notice that rate is fixed at Rs.1,20,000/- per acre. If really such rate would not have been fixed then certainly defendant no.1 would have specifically stated in his reply that averment made by the plaintiff is a false or incorrect. But that has not happened. In my opinion, this circumstance clearly indicates the contention of the defendant that rate was not fixed at Rs.1,20,000/- per acre is incorrect and false. So, I have absolutely no hesitation to hold that the facts and circumstances of the case clearly indicate that in the said agreement Exh.35 the price of the land was fixed at Rs.1,20,000/- per Acre.

12. The contention of the defendant that at the relevant time he was in need of money and as such he had asked his cousin brother Sudam to make arrangement and as plaintiff was known to Sudam he introduced the plaintiff to him and plaintiff agreed to lend money to the defendant no.1, however, as plaintiff was not having any money lending license he expressed that it would not

be possible to execute any mortgage deed and as a result of the same it was agreed to execute one agreement by way of security for money to be advanced by plaintiff to defendant no.1. So, according to him the agreement dated 4-12-1987 was not to be acted upon and the real transaction was not at all of an agreement to sell.

13. In order to prove this contention besides the bear interested word of the defendant there is absolutely no other evidence. In fact from the perusal of the agreement to sell Exh.35 it does appear that the said agreement is executed in the presence of some witnesses. The defendant could have examined those witnesses to point out as to what were the exact talks that took place between plaintiff and defendant and whether the agreement in question was executed only by way of security as contended by the defendant. But he has not adduced any such evidence. From the evidence on record it is very difficult to believe that the defendant would agree to execute the agreement to sell though inf act the real transaction was according to him was of loan. The defendant by raising such contention is trying to say some thing which is against the written document Exh.35. The learned trial Judge has rightly held that the defendant has failed to prove that real transaction between him and plaintiff was of loan. There is no reason to interfere with the said finding.

14. It was argued on behalf of the defendants that

present suit for specific performance is barred by law of limitation. However, it is pertinent to note that agreement to sell in question Exh.35 has been executed on 4-12-1987 as per clause 7 of the said agreement, sale deed was to be executed within one year after the compliance of the stipulations nos. 1 to 6 in the agreement. From the evidence on record it is crystal clear that defendant was to take certain steps such as getting land measured, providing road etc.. However there is nothing on record to indicate that those conditions nos.1 to 6 were fulfilled within one year. For that purpose no specific time was fixed in the agreement. All that has been stead in the said agreement is sale deed is to be executed within one year after the condition nos.1 to 6 are fulfilled. As pointed out by me above the said conditions were not fulfilled by plaintiff for long time. It was also not mentioned in the agreement that time is the essence of contact. Ultimately, the plaintiff issued notice to the defendant on 19-1-1991. So, considering all these aspects the learned trial Judge has rightly held that the suit is not barred by law of limitation.

15. It is case of the plaintiff that at the time of execution of an agreement to sell he had paid Rs.45,000/- and thereafter again he made payment by cheque as well as cash and in all Rs.1 lac were paid to the defendant. However, it is pertinent to note that he has not adduced any evidence to show as to when and how

subsequent payments were made by him and out of that which payment was by cheque and which was by cash. In fact it was very easy for him to adduce cogent evidence in that behalf if really he ha made some payment by cheque. But the plaintiff has failed to adduce any evidence in that behalf. Not only that but he could not prove that he paid amount of Rs.1 lac towards the consideration. Hence the learned trial Judge rightly disbelieved plaintiff's version in this behalf. Finding recorded by the trial court in this behalf is unassailable. Thus, we find that in the instant case though plaintiff is seeking specific performance of an agreement to sell he has not come to the court with clean hands he has taken false stand that he paid an amount of [Rs.1 lac to the defendant towards the agreement to sell in question. So, under such circumstances the learned trial Judge has rightly held that the plaintiff is not entitled to get decree for specific performance.

16. As I have held that plaintiff is not entitled to get decree for specific performance, question arises whether plaintiff is entitled for refund of earnest money. While considering this aspect it must be mentioned that the larned trial Judge has negatived plaintiff's claim in this behalf by observing that this alternative claim regarding refund of earnest money has been given up by the plaintiff by amending the plaint. However, I could not find any such amendment in the

record and hence both the learned advocates were called upon to verify the position. At that time it transpired that no such amendment is in fact on record as a result of which the plaintiff had given up his alternative claim of refund of earnest money.

17. At this stage only the learned Advocate appearing on behalf of the Respondent defendant also submitted on instructions that Respondent is ready to refund the earnest money. So, I think that this is a fit case where though plaintiff is not entitled for specific performance he is entitled to get back earnest money which he has paid to the defendant towards the agreement to sell in question. Besides this, it must also be noted that in the agreement also there is no specific clause that for one reason or the other if the agreement is not executed t or that if there is any breach on the part of the plaintiff the amount of earnest money will be forfeited. So, it is necessary to direct the defendant to refund the earnest amount.

18. Thus I find that the learned trial Judge has rightly negatived the plaintiff's claim with regard to specific performance, however, has wrongly rejected plaintiff's claim regarding refund of earnest money. '

19. In view of the above, the appeal is partly allowed. The order passed by the trial Court rejecting specific performance of the agreement to sell Exh.35 in favour of the plaintiff is confirmed. However, the defendant no.1

is directed to refund the amount of earnest money of Rs.45,000/- received by him to plaintiff along with simple interest at the rate of 6% p.a. from 19-11-1991 to the plaintiff within 4 weeks from today.

20. The parties to bear their own costs of this appeal.

21. At this stage the learned Advocate for the plaintiff submitted that execution and operation of the above order be stayed for 2 weeks. However, it must be noted that plaintiff's suit for specific performance was dismissed on 20-2-1999 and thereafter admittedly till 20-4-2005 there was absolutely no stay or any other relief in favour of the plaintiff. So, under such circumstances there is absolutely no necessity to grant any stay to the execution of the above mentioned order. Hence plaintiff's request in that behalf is rejected.

(S.R.SATHE,J.)